Supreme Court, U.S.
FILED

1

No. 05- 051404 APR 24 2006

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GALLENTHIN REALTY DEVELOPMENT, INC.; GEORGE A. GALLENTHIN, III, LTC, HUSBAND; CYNTHIA L. GALLENTHIN, WIFE,

Petitioners,

v.

BP PRODUCTS OF NORTH AMERICA, INC., d/b/a BP OIL COMPANY; ESSEX CHEMICAL CORPORATION; DOW CHEMICAL COMPANY; COMMERCE BANK/HARRISBURG NATIONAL ASSOCIATION, d/b/a COMMERCE BANK, N.A.; TRIAD ADVISORY SERVICES, INC., d/b/a TRIAD ASSOCIATES, INC.; URS CORPORATION; PARKER MCCAY & CRISCUOLO, P.A.; GLOUCESTER COUNTY IMPROVEMENT AUTHORITY; BOROUGH OF PAULSBORO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MICHAEL G. WALSH
Attorney for Petitioners
1025 North 30th Street
Allentown, PA 18104
(610) 434-3756

200851

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

I. Did the District Court have subject matter jurisdiction over a claim of maritime fraud asserted by Petitioners?

II. Does a private right of action exist under the River and Harbor Improvement Act, 33 U.S.C. § 540, thus providing the District Court with jurisdiction over Petitioners' claims?

III. Did the District Court have jurisdiction under the Commerce Clause to consider Petitioners' claims that a New Jersey borough engaged in a scheme to defraud them by exercising unlawful dominion and control over their 63-acre port/confined placement site along the Delaware River?

LIST OF PARTIES TO THE PROCEEDING

All of the parties to the proceeding may be found in the caption of this Petition.

CORPORATE DISCLOSURE STATEMENT

Gallenthin Realty Development, Inc., has no parent company. It issues no stock, and no publicly held company has any interest in the company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES TO THE PROCEEDING	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
TABLE OF APPENDICES	viii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
A. Jurisdiction of the Courts Below	3
B. Facts	3
REASONS FOR GRANTING THE PETITION ...	7
I. THIS COURT SHOULD ALLOW THE WRIT OF CERTIORARI TO CONSIDER WHETHER THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION OVER A CLAIM OF MARITIME FRAUD ALLEGED BY PETITIONERS	7

Contents

Page

A. The Basis for the District Court's Admiralty Jurisdiction 7

B. The Relationship between this Matter and the Petitioner's New Jersey Action 11

II. THIS COURT SHOULD ALLOW THE WRIT OF CERTIORARI TO DECIDE WHETHER A PRIVATE RIGHT OF ACTION EXIST UNDER THE RIVER AND HARBOR IMPROVEMENT ACT, 33 U.S.C. § 540, AN ISSUE OF FIRST IMPRESSION 12

III. THIS COURT SHOULD ALLOW THE WRIT OF CERTIORARI TO CONSIDER WHETHER THE DISTRICT COURT IGNORED PRIOR SUPREME COURT DECISIONS WHEN IT RULED THAT IT LACKED SUBJECT MATTER JURISDICTION TO CONSIDER THE PETITIONERS' CLAIM UNDER THE COMMERCE CLAUSE 14

CONCLUSION 18

TABLE OF CITED AUTHORITIES

Page

Cases:

American Dredging Co. v. Miller, 510 U.S. 443 (1994) 9

Boatowners and Tenants Association, Inc. v. Port of Seattle, 716 F.2d 669 (9th Cir. 1983) 13

C & A Carbone, Inc., v. Town of Clarkstone, 511 U.S. 383 (1994) 17

California v. Deep Sea Research, Inc., 523 U.S. 491 (1998) 11

Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249 (1972) 9

Foremost Insurance Co. v. Richardson, 457 U.S. 668 (1982) 10

Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995) 10

Harvey & Harvey, Inc. v. City of Chester, 68 F.3d 788 (3d Cir. 1995) 16

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949) 17

Jerome B., Grubart, Inc. v. Great Lakes Dedge & Dock Co., 513 U.S. 527 (1995) 10, 11

Cited Authorities

Page

Lewis v. B.T. Investment Managers, Inc., 447 U.S. 27 (1980) 14, 15

Norfolk Southern Corp. v. Oberly, 822 F.2d 388 (3d Cir. 1987) 17

R. M. S. Titanic, Inc. v. Haver, 171 F.3d 943 (4th Cir. 1999) 7

Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) 11

Sisson v. Ruby, 497 U.S. 358 (1990) 10

The Lottawanna, 88 U.S. 558, 21 Wall. 558, 22 L. Ed. 654 (1875) 9

The Propeller Genesee Chief v. Fitzhugh, 53 U.S. 443 (1852) 9

Wardair Canada, Inc. v. Florida Dept. of Revenue, 477 U.S. 1 (1986) 17

White Mountain Apache Tribe v. Williams, 810 F.2d 844 (9th Cir. 1985), *cert. denied*, 479 U.S. 1050 (1987) 15

Cited Authorities

Page

United States Constitution:

Article I, section 8, clause 3 ..... 2, 14

Article III, section 2, clause 1 ..... 2, 7

Statutes:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 ..... 2, 3

28 U.S.C. § 1331 3

28 U.S.C. § 1333 2

28 U.S.C. § 1333(1) 8

33 U.S.C. § 540, *et seq.* ..... i, 12

46 U.S.C. App. § 740 9

Extension of Admiralty Jurisdiction Act, 62 Stat. 496 9

Rule:

Fed. R. Civ. P. 12(b)(1) 1

Other Authority:

F. Frankfurter & J. Landis, *The Business of the Supreme Court* 7 (1927) 8

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Third Circuit Filed January 24, 2006 ..... 1a

Appendix B — Opinion Of The United States District Court For The Eastern District Of Pennsylvania Decided February 18, 2005 ..... 11a

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit, No. 05-1822, was submitted under Third Circuit LAR 34.1(a) on January 12, 2006, and filed on January 24, 2006. The Opinion may be found at 2006 U.S. App. LEXIS 1722 and is reproduced at page 1a of the Appendix.

By Order dated February 14, 2005, the United States District Court for the Eastern District of Pennsylvania, the Honorable Edmund V. Ludwig presiding, inter alia, granted the Respondents' motions and dismissed the Petitioners' Complaint for lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1). Reproduced at page 11a of the Appendix.

The District Court below also denied the Petitioners' "Motion[s] to Dismiss or otherwise Grant Leave to Amend the Complaint or Otherwise Conduct a Preliminary Hearing," filed in response to each Respondent's motion to dismiss the Complaint (docket numbers 26, 27, 28, 29, 30, 31, 32, and 34).

Finally, the District Court denied the Petitioners' "Motion to File a Sur Reply Brief to Respondent Commerce," "Motion for Leave to File Reply Brief to PMC's Memorandum of Law," and "Motion to Supplement the Record" (docket numbers 42, 43, and 44).

STATEMENT OF JURISDICTION

The Judgment sought to be reviewed was filed by the United States Court of Appeals for the Third Circuit under Third Circuit LAR 34.1(a) on January 24, 2006. The Court

of Appeals had jurisdiction over this appeal under 28 U.S.C. § 1291, which provides that the courts of appeals (other than that for the Federal Circuit) shall have jurisdiction over appeals from all final decisions of the district courts of the United States.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1), which permits review by writ of certiorari "in any civil or criminal case, before or after rendition of judgment or decree."

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, section 8, clause 3, of the Constitution of the United States states "the Congress shall have Power . . . to regulate Commerce . . . among the several States."

Article III, section 2, clause 1, of the Constitution of the United States provides that federal judicial power shall extend to "all Cases of admiralty and maritime Jurisdiction."

Title 28 of the United States Code, section 1333 ("Admiralty, maritime and prize cases") states in pertinent part:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> > (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

STATEMENT OF THE CASE

A. Jurisdiction of the Courts Below

The United States Court of Appeals for the Third Circuit, whose order is sought to be reviewed in this Petition, had jurisdiction over this matter pursuant to 28 U.S.C. § 1291 ("Final decisions of district courts"), which states in part:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . .

The United States District Court for the Eastern District of Pennsylvania had jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction).

B. Facts

Petitioners alleged in their Complaint that, beginning on October 22, 1897, the U.S. Army Corps of Engineers ("Corps") has numerous times deposited dredge material from the berths and channels of the Delaware River at Petitioners' 63-acre confined disposal facility, located in Paulsboro, New Jersey. Additional deposits were made in 1902, 1934, and 1937. On May 4, 1951, Petitioners' family, purchased the 63-acre facility, renaming it the Gallenthin Meadowlands Sediment Disposal and Recycling Facility, and continued its use as a disposal site for private dredge material. The family has continuously operated the site as a dredge disposal facility ever since. In June of 1964, the Corps placed 186,000 cubic yards of dredge material, under a ground lease from Petitioners, at the 63-acre site. This facility was permitted to accept Corps-dredged material under various acts of Congress.

Since 1996, Petitioners have continuously made improvements to the 63-acre tract, and have pursued diverse markets for their services throughout the Delaware Valley. One result of these efforts was a September, 1998 contract for the deposit, drying, and removal by rail of dredged material for mine reclamation in Tamaqua, Pennsylvania. In October, 2000, Petitioners contracted to develop their facility for portfield and brownfield reclamation and reuse. In August, 2002, Petitioners formally offered to purchase Respondent BP's 130-acre and Respondent Dow's 60-acre portfield real estate project for $78 million. In July, 2003, Petitioners submitted a "Waterfront Development Permit Application" to the New Jersey Department of Environmental Protection.

The gist of the Petitioners' action, as stated in Paragraph 26 of its Complaint, is as follows:

> On or about 6 March 2002, Respondents BP, Dow Chemical, and Essex Chemicals, for the expressed purpose of defrauding Petitioners of their business and real property, met with Respondents Triad, URS, Paulsboro, and GCIA at Respondent BP's offices in Townsend, Maryland. The plan developed at this meeting was implemented over the next thirteen months using the United States mail, interstate telephones, and U.S. highways.

Petitioners' Complaint further alleged that, in December, 2002, Respondents BP, Dow Chemical, and Essex Chemicals, by and through the direct professional services of the Respondents URS and Triad:

- "Voluntarily" place their 190 acres of real property into "redevelopment" with Respondent Paulsboro as their "partner";

- Knowingly included a substantial portion of Petitioners' real property into their redevelopment area without notice to Petitioners (as required by law);

- Removed any references to dredge material use to cover their toxic/contaminated 190 acres;

- Removed all references to cooperation with or the use of Petitioners' confined placement site as source of replacement soil;

- Violated Title 33 U.S.C. §§ 540, *et seq.*;

- Created a fictitious additional lot and block in Petitioners' "area in need of redevelopment" for the purpose of artificially creating a diversity of title (as required by law); and

- Concealed the required use of Petitioners' real property as an entrance and exit truck route.

Petitioners allege these acts were directly intended to place Respondent Paulsboro Borough in a position to exercise unlawful dominion and control over Petitioners' 63-acre port/ confined placement site. If successful, this scheme will result in a substantial financial benefit to all Respondents. Petitioners contend Respondents' scheme came to fruition on May 20, 2003, when Respondent Paulsboro Borough placed Petitioners' real property into redevelopment; thus directly and economically harming Petitioners by stripping

their development rights without due process, and without compensation.

Petitioners also averred in their Complaint that on May 27 and 29, 2003, Respondents BP, Dow Chemical, Essex Chemicals, Parker McCay & Criscuolo, GCIA, Triad, URS, Commerce Bank N/A, and Paulsboro announced a public meeting with the intention of placing a private road across the Petitioners' real property without providing any written notice to Petitioners (as required by law). On June 17, 2003, Respondents BP, Dow Chemical, Essex Chemicals, Parker McCay & Criscuolo, GCIA, Triad, URS, Commerce Bank N/A, and Paulsboro fraudulently held a public scoping meeting without said notice.

The District Court dismissed Petitioners' complaint for lack of subject matter jurisdiction, and the United States Court of Appeals for the Third Circuit affirmed.

Contemporaneously with this action, Petitioners instituted a suit in the Superior Court of Gloucester County, New Jersey, against the Borough of Paulsboro, New Jersey, and/or the Planning Board of Paulsboro and/or Paulsboro Redevelopment Agency. Petitioners' action was in response to the adoption by ordinance, on May 20, 2003, of a redevelopment plan by the Borough of Paulsboro Governing Body, which stripped Petitioners of development rights to their 63-acre tract. As of the filing date of this Petition, Petitioners are awaiting oral argument before the Superior Court of New Jersey, Appellate Division.

REASONS FOR GRANTING THE PETITION

I.

THIS COURT SHOULD ALLOW THE WRIT OF CERTIORARI TO CONSIDER WHETHER THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION OVER A CLAIM OF MARITIME FRAUD ALLEGED BY PETITIONERS

Petitioners' 63-acre tract at issue in this case lies in southern New Jersey, along and near the mouth of the Delaware River. Containing major port facilities in Pennsylvania, New Jersey, and Delaware, the River is one of the largest and most important freshwater waterways in the world. Commercial activity on it thus qualifies as maritime commerce. Petitioners' land sits directly on a federal commercial waterway built and maintained by specific act of Congress, and is used solely for commercial maritime purposes. Clearly, this dispute falls within the maritime jurisdiction of the federal courts, and the District Court below improperly dismissed the action for lack of subject matter jurisdiction. The issue of maritime fraud jurisdiction was raised at United States District Court and Third Circuit Court of Appeals levels, and both did not address the issue in their opinions.

A. The Basis for the District Court's Admiralty Jurisdiction

The United States Constitution expressly grants admiralty and maritime jurisdiction to federal courts. *See* Art. III, § 2, cl. 1 (providing that the federal judicial power shall extend to "all Cases of admiralty and maritime Jurisdiction"). In the exercise of that jurisdiction, federal courts have developed and applied a body of general maritime law, "the wellknown and welldeveloped venerable law of the sea which arose from the custom among seafaring men." *R. M. S. Titanic, Inc. v. Haver*, 171 F.3d 943, 960 (4th Cir. 1999). The

federal courts' role in maritime cases has been unique since the Country's founding due to its importance in providing political and economic unity among the States. In short, "maritime commerce was . . . the jugular vein of the Thirteen States" F. Frankfurter & J. Landis, *The Business of the Supreme Court* 7 (1927). Accordingly, "the need for a body of law applicable throughout the nation was recognized by every shade of opinion in the Constitutional Convention." *Ibid.* The constitutional provision was incorporated into the first Judiciary Act in 1789, and federal courts have retained "admiralty or maritime jurisdiction" ever since.

The District Court also had maritime jurisdiction over this case pursuant to 28 U.S.C. § 1333(1), which provides:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

This Court has explained that Article III's grant of admiralty and maritime jurisdiction

> must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial

> character affecting the intercourse of the States with each other or with foreign states.

American Dredging Co. v. Miller, 510 U.S. 443, 451 (1994) (*quoting The Lottawanna*, 88 U.S. 558, 21 Wall. 558, 575, 22 L. Ed. 654 (1875)). In *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 210 (1996), this Court explained that, "in several contexts, we have recognized that vindication of maritime policies demanded uniform adherence to a federal rule of decision." Maritime jurisdiction is not limited to tide waters. It extends to all public navigable lakes and rivers, where commerce is carried on between different states, or with foreign nation. *See The Propeller Genesee Chief v. Fitzhugh,* 53 U.S. 443 (1852) (superseded by statute as stated in *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249 (1972)).

Over the past half-century, Congress and the courts have enlarged maritime jurisdiction, particularly as regards torts committed on or near navigable waters. In 1948, Congress enacted the Extension of Admiralty Jurisdiction Act, 62 Stat. 496. The Act provided that

> the admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

46 U.S.C. App. § 740. This Court analyzed the purpose of the Act as being "to end concern over the sometimes confusing line between land and water, by investing admiralty with jurisdiction over 'all cases' where the injury was caused

by a ship or other vessel on navigable water, even if such injury occurred on land." *Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 532 (1995).

In the wake of the 1948 Amendment, this Court has recognized that "the fundamental interest giving rise to maritime jurisdiction is 'the protection of marine commerce,'" *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), and that "that interest cannot be fully vindicated unless 'all operators of vessels on navigable waters are subject to uniform rules of conduct.'" *Sisson v. Ruby*, 497 U.S. 358 (1990) (*quoting* 457 U.S. at 674-75). Thus, although an incident involving the commission of a tort may not occur on navigable waters, it may still have a sufficient connection with a maritime activity to justify the exercise of maritime jurisdiction. *See Jerome B., Grubart, Inc. v. Great Lakes Dedge & Dock Co.*, 513 U.S. 527 (1995). The events of which the Petitioners have complained throughout this litigation clearly meet this standard, thus conferring maritime jurisdiction on the District Court below.

In *Grubart*, Justice Souter sets forth what one commentator referred to as "a thumbnail sketch" of this rule regarding the application of maritime jurisdiction in cases such as the one now under consideration:

> [A] party seeking to invoke federal admiralty jurisdiction pursuant to 28 U.S.C. § 1333(1) over a tort claim must satisfy conditions both of location and of connection with maritime activity. A court applying the location test must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water. . . . The connection

> tests raises two issues. A court, first, must "assess the general features of the type of incident involved, "to determine whether the incident as "a potentially disruptive impact on maritime commerce." Second, a court must determine whether the general character" of the "activity giving rise to the incident" shows a "substantial relationship to traditional maritime activity."

Under Justice Souter's two-step test in *Grubart*, the District Court below clearly possessed maritime jurisdiction to hear this case. If the Respondents are permitted to carry on with their tortious conduct against the Petitioners and deprive them of their valuable land while simultaneously interfering with river traffic on the Delaware River, the impact on maritime commerce would indeed be disruptive. As to the second prong of the test, the actions of the Respondents undeniably bears a substantial relationship to traditional maritime activity on the Delaware River.

B. The Relationship between this Matter and the Petitioner's New Jersey Action

Past decisions of this Court have established that this federal action should take precedence over the New Jersey action filed by the Petitioners. *See Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373 (1959) ("[S]tate law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system . . ."). In *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998), this Court held that the Eleventh Amendment does not bar federal jurisdiction over in rem admiralty actions when the State is not in possession of the property.

The overreaching by the Borough of Paulsboro and its governing bodies has not only made inroads in a previously harmonious system but also directly affected the maritime activity on the Delaware River. The actions by these local officials cannot bar the exercise of maritime jurisdiction by the District Court. Its failure to do so amounted to an egregious lapse of judgment that can be corrected by this Court's grant of certiorari.

II.

THIS COURT SHOULD ALLOW THE WRIT OF CERTIORARI TO DECIDE WHETHER A PRIVATE RIGHT OF ACTION EXIST UNDER THE RIVER AND HARBOR IMPROVEMENT ACT, 33 U.S.C. § 540, AN ISSUE OF FIRST IMPRESSION

The Petitioners based this action in part on the River and Harbor Improvements Act, 33 U.S.C. § 540, *et seq.* ("Act"), which states in pertinent part:

> Federal investigations and improvements of rivers, harbors, and other waterways shall be under the jurisdiction of and shall be prosecuted by the War Department [Department of the Army] under the direction of the Secretary of War [Secretary of the Army] and the supervision of the Chief of Engineers, except as otherwise specifically provided by Act of Congress, which said investigations and improvements shall include a due regard for wildlife conservation.

In the only federal appellate decision found on this issue, the Ninth Circuit, in an action by private owners of

recreational boats arising from allegedly excessive marina fees, stated:

> The statutory language and legislative history thus indicate an intent to improve navigation, enhance commerce, and reduce vehiclevessel traffic problems, all to the benefit of the general public. There is no evidence whatsoever of an intent to provide economical moorage or to create any special benefit for the class of pleasure craft owners. BOATA thus has no enforceable rights under the Act.

Boatowners and Tenants Association, Inc. v. Port of Seattle, 716 F.2d 669, 673-74 (9th Cir. 1983). In ruling that the Act did not afford the Petitioners in this case with a private right of action, the Third Circuit expressly relied on *Boatowners*, notwithstanding that the facts of the Petitioners' case bore no resemblance to those in *Boatowners*. If, indeed, the Ninth Circuit is correct in its observation that the Act's "statutory language and legislative history thus indicate an intent to improve navigation, enhance commerce, and reduce vehiclevessel traffic problems," then the Petitioner's allegations place their case squarely within the Act's boundaries.

As this Court has not ruled to date on whether the Act provides a private right of action, it should grant certiorari to consider this important issue. The Respondents' conduct of which the Petitioners have complained relates directly to the improvement of navigation, the enhancement of commerce, and the possible reduction of vehicle-vessel traffic problems, thus squarely placing the case within the Act.

III.

THIS COURT SHOULD ALLOW THE WRIT OF CERTIORARI TO CONSIDER WHETHER THE DISTRICT COURT IGNORED PRIOR SUPREME COURT DECISIONS WHEN IT RULED THAT IT LACKED SUBJECT MATTER JURISDICTION TO CONSIDER THE PETITIONERS' CLAIM UNDER THE COMMERCE CLAUSE

The Commerce Clause provides in part that "the Congress shall have Power . . . to regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. This Court has made it clear that, "[a]lthough the Clause speaks in terms of powers bestowed upon Congress, the Court has long recognized that it also limits the power of the States to erect barriers against interstate trade." *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27, 35 (1980). That is precisely what the Respondent Paulsboro is attempting in this case. By acting in concert with the other Respondents, Paulsboro is in a position to exercise unlawful dominion and control over the Petitioners' 63-acre port/confined placement site and then, as a direct result, financially benefit all of the Respondents. Ultimately, if left unchecked, this action by Paulsboro would erect barriers against the Petitioners, who are residents of Pennsylvania and are therefore routinely engaged in interstate commerce. These barriers, the Petitioners' have averred in their complaint, would benefit the other Respondents with whom the Petitioners are in competition.

The purpose of the Commerce Clause is the allocation of power between state and national governments, not the protection of individuals from the abuse of government

authority. *See White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 849 (9th Cir. 1985), *cert. denied*, 479 U.S. 1050 (1987). The Commerce Clause creates no individual rights. *Id.* Nevertheless, the District Court's rejection of the Petitioners' Commerce Clause claim, on the ground that "no facts are alleged to suggest that the Borough of Paulsboro's designation of Petitioners' property as an 'area in need of redevelopment' materially affects such commerce," is not borne out by the facts and runs afoul of this Court's holding in *Lewis*, *supra*.

The Petitioners' alleged in their Complaint numerous facts implicating the Borough of Paulsboro in a scheme to defraud the Petitioners with the aid of the other named Respondents. The Complaint of the Petitioners alleged, inter alia, that, in December, 2002, the Respondents BP, Dow Chemicals, and Essex Chemicals, by and through the direct professional services of the Respondents URS and Triad:

- "Voluntarily" place their 190 acres of real property into "redevelopment" with the Respondent Paulsboro as their "partner";

- Knowingly included a substantial portion of the Petitioners' real property into their redevelopment area without any required notice to the Petitioners;

- Removed any references to dredge material use to cover their toxic/ contaminated 190 acres;

- Removed all references to cooperation with or the use of the Petitioners' confined placement site as source of replacement soil;

- Violated Title 33 U.S.C. §§ 540, *et seq.*;

- Created a fictitious additional lot and block in the Petitioners' "area in need of redevelopment" to create the required diversity of title; and

- Concealed the required use of the Petitioners' real property as an entrance and exit truck route (A41).

The Petitioners alleged that these acts were intended to place the Respondents' "partner," the Respondent Paulsboro, in a position to exercise unlawful dominion and control over the Petitioners' 63-acre port/confined placement site and then, as a direct result, financially benefit all of the Respondents (A31).

The District Court's conclusion that "no facts are alleged [in the Petitioners' complaint] to suggest that the Borough of Paulsboro's designation of Petitioners' property as an 'area in need of redevelopment' materially affects such commerce" (A4) is simply not supported by the Petitioners' specific pleadings as summarized above. Moreover, the District Court misinterpreted the cases it cites in support of its statement that "[s]tate municipalities may incidentally burden interstate commerce in the regulation of local domestic commerce," as a close reading of *Harvey & Harvey, Inc. v. City of Chester*, 68 F.3d 788, 797 (3d Cir. 1995), and the cases it cites reveals.

In considering Commerce Clause challenges, courts should "determine whether action taken by state or local authorities unduly threatens the values the Commerce Clause was intended to serve." *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 399 (3d Cir. 1987) (*quoting Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986)). In short, the purpose of the Commerce Clause is to prevent "state and local governments [from using] their regulatory power to favor local enterprise by prohibiting patronage of outofstate competitors or their facilities." *C & A Carbone, Inc., v. Town of Clarkstone*, 511 U.S. 383 (1994); *see also H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 53738 (1949). There can be little doubt that the unholy alliance among the Respondent Paulsboro and the other Respondents amounts to a transparent attempt by the former to use its regulatory power to favor the latter, especially the Respondents BP, Dow Chemical, and Essex Chemicals, at the expense of the Petitioners, their out-of-state competitors.

In short, the facts of this case and the precedents cited above clearly establish that the District Court ignored or misapplied precedents of this Court when it ruled that it lacked subject matter jurisdiction in this case with respect to the Petitioners' Commerce Clause claim.

CONCLUSION

The undersigned respectfully requests that this Court grant certiorari in this matter for the reasons stated above.

Respectfully submitted,

LTC George A. Gallenthin, III
Attorney for Petitioners
P.O. Box 7866
Philadelphia, PA 19101-7866
(215) 680-6771

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JANUARY 24, 2006

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 05-1822

January 12, 2006, Submitted Under
Third Circuit LAR 34.1(a)

January 24, 2006, Filed

GALLENTHIN REALTY DEVELOPMENT, INC.; GEORGE A. GALLENTHIN, III, LTC, HUSBAND; CYNTHIA L. GALLENTHIN, WIFE

v.

BP PRODUCTS OF NORTH AMERICA, INC., d/b/a BP OIL COMPANY; ESSEX CHEMICAL CORPORATION; DOW CHEMICAL COMPANY; COMMERCE BANK/ HARRISBURG NATIONAL ASSOCIATION, d/b/a COMMERCE BANK, N.A.; TRIAD ADVISORY SERVICES, INC., d/b/a TRIAD ASSOCIATES, INC.; URS CORPORATION; PARKER MCCAY & CRISCUOLO, P.A.; GLOUCESTER COUNTY IMPROVEMENT AUTHORITY; BOROUGH OF PAULSBORO; Gallenthin Realty Development, Inc.; LTC George A. Gallenthin, III, Husband; Cynthia L. Gallenthin, Wife,

Appellants

Appendix A

JUDGES: Before: BARRY, AMBRO and ALDISERT, Circuit Judges.

OPINION BY: AMBRO

OPINION: AMBRO, Circuit Judge

This case arises from Plaintiffs' contemplated redevelopment of their real estate located in the Borough of Paulsboro, Gloucester County, New Jersey.[1] Plaintiffs filed a complaint alleging claims for declaratory judgment, fraud, and unjust enrichment. The United States District Court for the Eastern District of Pennsylvania ruled that it lacked subject matter jurisdiction over those claims notwithstanding Plaintiffs' invocation of *28 U.S.C. § 1331*, the River and Harbors Improvement Act, *33 U.S.C. § § 540 et seq.*, and the *Commerce Clause, U.S. Const. art. I, § 8, cl. 3*. For the reasons explained below, we affirm the order of the District Court dismissing for lack of jurisdiction.

I. Facts and Procedural Background

As we write for the parties, only a brief summary of pertinent facts is necessary. Plaintiffs own a 63-acre parcel

1. The plaintiffs include Gallenthin Realty Development, Inc., and its owners, LTC George A. Gallenthin, III and Cynthia L. Gallenthin, husband and wife (hereinafter "Plaintiffs"). The defendants include BP Products of North America, Inc., Essex Chemical Corporation, Dow Chemical Corporation, Commerce Bank/Harrisburg National Association, Triad Advisory Services, Inc., URS Corporation, Parker, McCay & Criscuolo, P.A., the Gloucester County Improvement Authority, and the Borough of Paulsboro (hereinafter "Defendants").

of land, currently operated as a disposal facility, that fronts the Delaware River. Since 1996, Plaintiffs have taken steps in anticipation of a complete redevelopment of the site, including failed attempts to purchase two contiguous properties—a 130-acre parcel owned by defendant BP Products of North America, Inc. (BP) and a 60-acre parcel owned by defendant Dow Chemical Company (Dow). Moreover, in July 2003, Plaintiffs submitted a "Waterfront Development Permit Application" to the New Jersey Department of Environmental Protection.

According to Plaintiffs, Defendants devised a scheme to thwart their proposed redevelopment and thereby deprive Plaintiffs of their property rights. Specifically, they allege that in March 2002, representatives of BP, Dow, and Essex Chemical Corporation (Essex) met with representatives of Triad Advisory Services, Inc., URS Corporation, the Borough of Paulsboro (Borough) and the Gloucester County Improvement Authority to develop a plan to exercise unlawful dominion and control over Plaintiffs' property that would financially benefit Defendants to Plaintiffs' detriment. The complaint alleges that this scheme came to fruition in May 2003, when the Borough adopted an ordinance approving a "Redevelopment Plan" under the Local Housing and Redevelopment Law, *New Jersey Stat. Ann. § 40A:12A-7*, which resulted in the designation of Plaintiffs' property, among others, as an "area in need of redevelopment."

In response to the acts of the Borough, Plaintiffs filed a complaint against the Borough, the Paulsboro Planning Board, and the Paulsboro Redevelopment Agency in the Superior Court of New Jersey, Gloucester County,

challenging the validity of the ordinance. The Superior Court dismissed the complaint, concluding that Plaintiffs could not demonstrate that the public entities named in the lawsuit had acted arbitrarily and capriciously in designating their property and other properties as an area in need of redevelopment. Plaintiffs timely appealed the dismissal of their complaint to the Appellate Division.

During the pendency of their state court appeal, Plaintiffs filed this case in federal District Court, again challenging the validity of the Borough's action — this time naming a number of private parties as defendants and contending that they engaged in a joint effort to deprive them of their property.[2] Plaintiffs contend that the District Court had federal question jurisdiction over the action pursuant to *28 U.S.C. § 1331*, as they asserted claims arising under the River and Harbor Improvement Act and the *Commerce Clause*. The complaint also alleged common law fraud and unjust enrichment claims. All Defendants moved to the dismiss the complaint, interposing (1) lack of subject matter jurisdiction, (2) lack of ripeness, (3) abstention doctrine dictates, and (4) failure to state a claim upon which relief can be granted.

The District Court entered an order dismissing Plaintiffs' complaint on the ground that they had failed to allege any basis for the exercise of federal subject matter jurisdiction. Specifically, the Court ruled that (1) the River and Harbor

---

2. The Paulsboro Planning Board and the Paulsboro Redevelopment Agency were not named as defendants in Plaintiffs' federal action.

Improvements Act did not provide a private right of action and, therefore, could not afford Plaintiffs a predicate for jurisdiction, regardless whether the alleged violations occurred and (2) the *Commerce Clause* did not offer a basis for the exercise of federal jurisdiction because no facts were alleged to suggest that the Borough's designation of Plaintiffs' property as an area in need of redevelopment materially affects interstate commerce. Rather, the Court explained, "the factual allegations in the complaint, taken as true, are a private individual's challenge to the exercise by a municipality of its power to enact local land use law; no more. Without a sound basis for the exercise of federal jurisdiction, this action must be dismissed." The District Court further held that even if it were to grant Plaintiffs' motion for leave to amend their complaint to allege some other basis for federal jurisdiction, that amendment would be futile because Plaintiffs' claims "are not ripe and because the doctrine of abstention would not permit the exercise of jurisdiction." This appeal followed.

II. Standard of Review

We have jurisdiction under *28 U.S.C. § 1291* and exercise plenary review over the District Court's order dismissing Plaintiffs' complaint for lack of subject matter jurisdiction. *See, e.g., In re Kaiser Group Intern. Inc.*, 399 F.3d 558, 561 (3d Cir. 2005); *Turicentro, S.A. v. American Airlines Inc.*, 303 F.3d 293, 300 (3d Cir. 2002) (citing *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000)). In the appeal from the grant of a motion to dismiss for lack of subject matter jurisdiction under *Federal Rule of Civil Procedure 12(b)(1)*, "'we review only whether the allegations

on the face of the complaint, taken as true, allege facts sufficient to invoke the jurisdiction of the district court.'" *Turicentro*, 303 F.3d at 300 (quoting *Licata v. United States Postal Serv.*, 33 F.3d 259, 260 (3d Cir. 1994)). "Challenges to subject matter jurisdiction under *Rule 12(b)(1)* may be 'facial' or 'factual.' Facial attacks, like the one here, contest the sufficiency of the pleadings, and the trial court must accept the complaint's allegations as true." *Turicentro*, 303 F.3d at 300, n.4 (citing *NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 341 n.7 (3d Cir. 2001)).

III. Discussion

Federal district courts have subject matter jurisdiction over all civil actions that arise either (1) under the Constitution, laws or treaties of the United States (called federal question jurisdiction), or (2) between citizens of different states where the matter in controversy exceeds $75,000 (referred to as diversity jurisdiction). *28 U.S.C. §§ 1331-1332*. Plaintiffs here do not submit that the District Court has subject matter jurisdiction based on diversity of citizenship. Instead, their complaint expressly alleges federal question jurisdiction because the claims arise under the Constitution and statutory law of the United States.

A claim arises under federal law if it is apparent from the face of the plaintiff's complaint that the plaintiff's cause of action was created by federal law. *See Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350, 353 (3d Cir. 1995) ("Under the well-pleaded complaint rule, a cause of action 'arises under' federal law . . . only if there is a federal question presented on the face of the plaintiff's properly pleaded

complaint"). When jurisdiction is challenged, it is the plaintiff's burden to establish that jurisdiction exists. *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991). Plaintiffs contend that they have a cognizable federal claim under the Harbor and River Improvements Act because the Act prohibits the "named defendants from any lawful exercise of authority over the Plaintiffs' maritime business or real assets." We disagree.

The Harbor and River Improvements Acts grants authority to the Army Corps of Engineers to conduct investigations and improvements of rivers, harbors and waterways, to grant easements on lands acquired by the United States for river and harbor improvements, to approve the plans of private persons or municipal corporations who desire to improve navigable rivers at their own expense, to procure the services of experts, and to award contracts for architectural, engineering, surveying and mapping services. *See 33 U.S.C. § § 540-633.* It does not provide, however, an express private right of action to persons allegedly injured by violations of its provisions. *See Boatowners and Tenants Ass'n, Inc. v. Port of Seattle*, 716 F.2d 669, 673-74 (9th Cir. 1983) (holding that River and Harbor Improvements Act does not afford a private right of action to association of boat owners who moored their boats at marina and who brought action against municipality contending that imposition of unreasonable fees constituted a deprivation of federal statutory rights).

As Defendants emphasize, Plaintiffs cite no case or other authority to support their contention that they have a private right of action under the River and Harbor Improvements

Act. Moreover, Plaintiffs have failed to establish that the Act impliedly creates a private cause of action by demonstrating that they are "one of the class for whose *especial* benefit the statute was enacted," that Congress intended to create a private right of action for individuals in their class, or that their cause of action is not one traditionally relegated to state law (and thus inferring a cause of action based solely on federal law). *See id.* at 672 (setting forth elements to be analyzed in determining whether a federal statute creates an enforceable private right of action) (emphasis in original); *cf. California v. Sierra Club*, 451 U.S. 287, 297-98, 101 S. Ct. 1775, 68 L. Ed. 2d 101 (1981) (no private right of action implied on behalf of those allegedly injured by violation of the River and Harbor Appropriations Act prohibiting obstructions of rivers, harbors and waterways except on plans recommended by the Chief of Engineers). Because no private right of action-either express or implied-is provided by the River and Harbor Improvements Act, the District Court properly concluded that the Act cannot serve as a basis for the exercise of federal question jurisdiction.

Plaintiffs further argue that they have a cognizable federal claim under the *Commerce Clause*, which provides that "the Congress shall have power . . . to regulate Commerce . . . among the several states." *U.S. Const. art. I, § 8, cl.3.* "Although the Clause speaks in terms of powers bestowed upon Congress, the [Supreme] Court has long recognized that it also limits the power of the States to erect barriers against interstate trade." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35, 100 S. Ct. 2009, 64 L. Ed. 2d 702 (1980). That is, the *Commerce Clause* has a negative, colloquially called "dormant," aspect that limits state

authority to regulate areas where "Congress has not affirmatively acted to either authorize or forbid the challenged state activity." *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3d 701, 710 (3d Cir. 1995) (quoting *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 392 (3d Cir. 1987)). It is undisputed that Congress has neither prohibited nor authorized the ordinance at issue. Consequently, we must consider whether the Borough's ordinance approving the designation of Plaintiffs' property as an "area in need of redevelopment" violates the dormant *Commerce Clause*.

As we have made clear in cases involving the dormant *Commerce Clause*, state municipalities may incidentally burden interstate commerce in the regulation of local domestic commerce. *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 797 (3d Cir. 1995) (statute that affects interstate commerce will be upheld unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits" (quoting *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970)); *see also Elberton Southern Ry. Co. v. State Highway Dept.*, 211 Ga. 838, 89 S.E.2d 645, 649 (Ga. 1955) ("[A] state may exercise the power of eminent domain although interstate commerce may be indirectly or incidentally involved."). Simply stated, while the purpose of the dormant *Commerce Clause* is to prevent "state and local governments [from using] their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities," *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 394, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994), its "purpose...is not to protect individual

firms," *Harvey & Harvey, Inc.*, 68 F.3d at 798. Here, Plaintiffs have alleged no facts to suggest that the Borough's designation of the Plaintiffs' property as an "area in need of redevelopment" unduly burdens or materially affects interstate commerce. As a result, we must conclude that the dormant *Commerce Clause* does not give rise to the proper exercise of subject matter jurisdiction.

* * * *

For the reasons provided above, the decision of the District Court as to lack of subject matter jurisdiction is affirmed. As such, we need not reach whether the Court correctly concluded that dismissal of the Plaintiffs' complaint was also required under the ripeness and abstention doctrines.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DECIDED FEBRUARY 18, 2005

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION, No. 04-4849

February 18, 2005, Decided

GALLENTHIN REALTY DEVELOPMENT, INC., et al.

v.

BP PRODUCTS OF NORTH AMERICA, et al.

JUDGES: Edmund V. Ludwig, J.

OPINION BY: Edmund V. Ludwig

OPINION:

MEMORANDUM

Ludwig, J.

This action arises from plaintiffs' contemplated redevelopment of their real estate located in the Borough of Paulsboro, Gloucester County, New Jersey.[1] The complaint

1. Plaintiffs are Gallenthin Realty Development, Inc., and its owners, LTC George A. Gallenthin, III and Cynthia L. Gallenthin, (Cont'd)

purports to aver claims for declaratory judgment (Count I), fraud (Count II), and unjust enrichment (Count III), based on the following facts: Plaintiffs own a 63-acre parcel of land with frontage on the Delaware River - currently operated as a disposal facility.[2] Complaint, PP17, 18. Since 1996, plaintiffs have taken steps in anticipation of a complete redevelopment of the site, Complaint, P18, including attempting to purchase two contiguous properties - a 130-acre parcel owned by defendant BP and a 60-acre parcel owned by defendant Dow. In July 2003, they submitted a "Waterfront Development Permit Application" to the New Jersey Department of Environmental Protection. Complaint, PP18(t), (v).

Beginning March 2002, defendants are alleged to have devised a scheme to thwart the proposed redevelopment and thereby deprive plaintiffs of their property rights. Complaint,

---

(Cont'd)

husband and wife. Defendants are BP Products of North America, Inc, Essex Chemical Corporation, Dow Chemical Corporation, Commerce Bank/Harrisburg National Association, Triad Advisory Services, Inc., URS Corporation, Parker, McCay & Criscuolo, P.A., Gloucester County Improvement Authority, and the Borough of Paulsboro.

2. The property receives material discharged by the United States Army Corps of Engineers, which periodically dredges the Delaware River for navigation and other purposes. Plaintiffs propose to use the property to accept and process dredge material for reclamation of mines, "portfields," and "brownfields." Complaint, PP17, 18(i), (n). Plaintiff would develop "commercial, light industrial and waterfront-related commercial uses" on the property. Complaint, P18(h).

P26. In May 2003, defendant Borough of Paulsboro adopted an ordinance approving a "Redevelopment Plan" under the Local Housing and Redevelopment Law, *N.J.S.A. 40A:12A-7*, and designated plaintiffs' property, among others, as an "area in need of redevelopment."[3] Complaint, PP29, 20. Its doing so is alleged to have benefitted defendants, and harmed plaintiffs.[4]

All defendants move to dismiss the complaint, asserting (1) lack of subject matter jurisdiction; (2) lack of ripeness;

---

3. Plaintiffs thereupon filed a "Complaint in Lieu of Prerogative Writ" in New Jersey Superior Court, Gloucester County, Law Division, against the Borough of Paulsboro and others challenging the validity of the ordinance. On July 7, 2004, following a hearing on June 25, 2004, the complaint was dismissed. Plaintiffs' appeal to the Appellate Division is pending. See Exhibits "A" (complaint in lieu of prerogative writ), "B" (transcript of June 25, 2004 hearing before the Honorable George H. Stanger, Jr.), "C" (July 7, 2004 order), and "D" (notice of appeal) to the "Brief of Defendant Commerce Bank/Harrisburg National Association in Support of Motion to Dismiss Complaint." These records, though not described in or attached to the complaint, may be considered in deciding a motion to dismiss. See *Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping, Ltd.*, 181 F.3d 410, 426 (3d Cir. 1999).

4. Recently, Gloucester County publicly gave notice that it will construct an overpass across a portion of plaintiffs' property, linking Interstate 295 with a "proposed deepwater port facility" to be constructed on BP's 130 acres. Adam Fifield, County Announces a Deal to Build an I-295 Overpass, PHILADELPHIA INQUIRER, Feb. 3, 2005, at B1. Furthermore, "there [will] be negotiations with Gallenthin over the use of a portion of his land for the overpass and . . . if negotiations fail[], 'eminent domain [will] be engaged.'" Id., quoting John Burzichelli, Mayor of Paulsboro.

(3) abstention doctrine dictates; and (4) lack of a claim upon which relief can be granted. Because subject matter jurisdiction has not been substantiated, the motions were granted by order dated February 15, 2005.[5]

The complaint premises itself on federal question jurisdiction, *28 U.S.C. § 1331*, and asserts violations of both the River and Harbor Improvement Act, *33 U.S.C. § 540*, and the Commerce Clause of the United States Constitution, Article I, Section 8.[6] Complaint, PP2-4. However, the *River and Harbor Improvement Act* has been dispositively held not to embody a private right of action. *California v. Sierra Club*, 451 U.S. 287, 297-98, 68 L. Ed. 2d 101, 101 S. Ct. 1775 (1981); *Boatowners & Tenants Asso. v. Port of Seattle*, 716 F.2d 669, 673-74 (9th Cir 1983). It, therefore, cannot afford plaintiffs a predicate for jurisdiction, regardless whether the alleged violations have occurred.

Moreover, with respect to the *Commerce Clause*, which gives Congress exclusive power to regulate interstate commerce, no facts are alleged to suggest that the Borough of Paulsboro's designation of plaintiffs' property as an "area in need of redevelopment" materially affects such commerce.

---

5. Plaintiffs' motion to amend was also denied, given the lack of ripeness and the obligation to abstain from deciding a matter more properly considered by the New Jersey state court. Amendment would appear to be futile. Infra, at 4-5. For these reasons, the complaint was not assessed under *Fed. R. Civ. P. 12(b)(6)*.

6. There is no basis for diversity jurisdiction, inasmuch as all plaintiffs and some defendants are citizens of Pennsylvania. Complaint, PP7-16.

Appendix B

State municipalities may incidentally burden interstate commerce in the regulation of local domestic commerce. See *Harvey & Harvey, Inc. v. City of Chester*, 68 F.3d 788, 797 (3d Cir. 1995), quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970) (statute that affects interstate commerce "will be upheld unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'") See also *Elberton S. R. Co. v. State Highway Dep't*, 211 Ga. 838, 89 S.E.2d 645, 649 (Ga. 1955) ("A State may exercise the power of eminent domain although interstate commerce may be indirectly or incidentally involved."). In short, "the purpose of the *Commerce Clause* is not to protect individual firms." *Harvey, 68 F.3d at 799*. Accordingly, the *Commerce Clause* does not offer grounds for the exercise of subject matter jurisdiction in this case.

Plaintiffs' "Motion to Dismiss or Otherwise Grant Leave to Amend the Complaint," filed in response to defendants' motions to dismiss, implicates federal jurisdiction under various Acts of Congress: the Sherman Act, *15 U.S.C. § 2*; the Federal Coastal Zone Management Act, *16 U.S.C. § 1451*; the Hobbs Act, *18 U.S.C. § 1951*; the Declaratory Judgment Act, *28 U.S.C. § 2201*; the Federal Water Pollution Act, *33 U.S.C. § 401* and *§ 1251*; and the Civil Rights Act, *42 U.S.C. § 1983*. With the exception of the *Declaratory Judgment Act*, which cannot be an independent source of jurisdiction, see *Terra Nova Ins Co. v. 900 Bar, Inc.*, 887 F.2d 1213, 1218 n.2 (3d Cir. 1989), none of these Congressional statutes is mentioned or adverted in the complaint.

Appendix B

"Under the well-pleaded complaint rule, a cause of action 'arises under' federal law . . . only if a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350, 353 (3d Cir. 1995). When jurisdiction is challenged, it is plaintiff's burden to establish that jurisdiction exists. *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991). Here, plaintiffs have not done so. The factual allegations in the complaint, taken as true, are a private individual's challenge to the exercise by a municipality of its power to enact local land use law; no more. Without a sound basis for the exercise of federal jurisdiction, this action must be dismissed.

Plaintiffs request leave to amend. Axiomatically, leave to amend, "shall be freely given when justice so requires," *Fed. R. Civ. P. 15(a)*, unless the amendment would be futile.[7] Here, even if the amended complaint proposed a good basis for federal jurisdiction,[8] dismissal would be required because

---

7. *Rule 15(a)* declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. . . . In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of amendment, futility of amendment, etc. - the leave should, as the rules require, 'be freely given.'" *Foman v. Davis*, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962). See also *Jablonski v. Pan Am World Airways, Inc.*, 863 F.2d 289, 292 (3d Cir. 1988).

8. In this instance, the lack of the proffer of the proposed amended complaint is sufficient to deny the request. See *Cureton v. National Collegiate Athletic Ass'n*, 252 F.3d 267, 273 (3d Cir. 2001).

the claims are not ripe[9] and because abstention doctrine would not permit the exercise of jurisdiction.[10]

BY THE COURT:

Edmund V. Ludwig, J.

---

9. "A court has no alternative but to dismiss an unripe action." *Ernst & Young v. Depositors Economic Protection Corp.*, 45 F.3d 530, 535 (1st Cir. 1995). Here, though plaintiff's property has been designated an "area in need of redevelopment," no declaration of taking has been filed by the Borough. Until plaintiffs' property is condemned, and the condemnation approved by the New Jersey courts, it is unlikely that a controversy exists. *See Eddystone Equip. and Rental Corp. v. Redevelopment Auth. of Cty. of Delaware*, 1988 U.S. Dist. LEXIS 4577, 1998 WL 52082, at *2 (E.D. Pa., May 17, 1988). See also *Patel v. City of Chicago*, 383 F.3d 569, 573 (7th Cir. 2004) (where ordinance identified potential targets for acquisition, but no condemnation had been taken place, no injury had occurred and civil rights case filed by plaintiffs was not ripe). A de facto condemnation is not alleged. See complaint.

10. See *Younger v. Harris*, 401 U.S. 37, 46, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971); *Gwynedd Properties, Inc. v. Lower Gwynedd Township*, 970 F.2d 1195, 1199 (3d Cir. 1992) (abstention doctrine reflects a "strong federal policy against federal court interference with pending judicial proceedings absent extraordinary circumstances"). *Younger* abstention is appropriate where (1) there are ongoing state proceedings that are judicial in nature; (2) the proceedings involve state interests; and (3) the state proceedings offer adequate opportunity to litigate any federal claims. *Id.* at 1200. As noted, plaintiffs' appeal in their state case is pending. Further, the legality of a local land use ordinance entails special state interests. New Jersey law sets forth a mechanism for condemnees to challenge

(Cont'd)

Appendix B

(Cont'd)
any aspect of a condemnation in state court. See *N. J.S.A. 20:3-5*. Abstention is also appropriate under *Burford v. Sun Oil Co.*, 319 U.S. 315, 318, 87 L. Ed. 1424, 63 S. Ct. 1098 (1943); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976) (abstention appropriate to avoid disrupting state's effort to "establish a coherent policy with respect to a matter of substantial public concern). See *Coles v. Street*, 38 Fed. Appx. 829, 831 (3d. Cir. 2002) (affirming district court decision to abstain in eminent domain case because "questions of state law concerning a state's desire to establish a coherent policy with respect to a matter of substantial public concern, such as eminent domain, abstention is proper.")

Supreme Court, U.S.
FILED
JUN 5 - 2006
OFFICE OF THE CLERK

No. 05-1404

IN THE

Supreme Court of the United States

GALLENTHIN REALTY DEVELOPMENT, INC.;
GEORGE A. GALLENTHIN, III, LTC, HUSBAND;
CYNTHIA L. GALLENTHIN, WIFE,

Petitioners,

v.

BP PRODUCTS OF NORTH AMERICA, INC., D/B/A BP OIL COMPANY; ESSEX CHEMICAL CORPORATION; DOW CHEMICAL COMPANY; COMMERCE BANK/HARRISBURG NATIONAL ASSOCIATION, D/B/A COMMERCE BANK, N.A.; TRIAD ADVISORY SERVICES, INC., D/B/A TRIAD ASSOCIATES, INC.; URS CORPORATION; PARKER MCCAY & CRISCUOLO, P.A.; GLOUCESTER COUNTY IMPROVEMENT AUTHORITY; BOROUGH OF PAULSBORO

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS BP PRODUCTS OF NORTH AMERICA, INC., ESSEX CHEMICAL CORPORATION, AND DOW CHEMICAL COMPANY

ALEXANDER KERR
MCCARTER & ENGLISH, LLP
Counsel for Respondent
BP Products of North America, Inc.
Mellon Bank Center, Suite 700
1735 Market Street
Philadelphia, PA 19103-7501
(215) 979-3800

(Additional Counsel Listed on Signature Page)

201553

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

I. Whether Petitioners' claim of maritime fraud is nothing more than a claim of common law fraud, and hence beyond the scope of federal subject matter jurisdiction.

II. Whether the River and Harbor Improvement Act, 33 U.S.C. § 540, contains an implied private right of action, when there has been no showing by Petitioners that they are part of the class for whose special benefit the statute was enacted.

III. Whether the dormant Commerce Clause provides a basis for the exercise of federal jurisdiction where the facts alleged implicate only a private individual's challenge to a municipality's exercise of its power to enact local land use laws and does not burden or affect interstate commerce.

CORPORATE DISCLOSURE STATEMENT

BP Company of North America, Inc. and The Standard Oil Company are the parent companies of Respondent BP Products North America, Inc. BP P.L.C. is the only publicly held company that owns 10% or more of the Respondent BP Products North America, Inc.'s stock.

The Dow Chemical Company ("Dow") is a publicly held corporation and the parent corporation of Essex Chemical Corporation ("Essex") and Dow owns all of the stock of Essex. No corporation owns 10% or more of Dow's stock. Dow does not have a parent corporation.

TABLE OF CONTENTS

Page

Questions Presented i

Corporate Disclosure Statement ii

Table of Contents iii

Table of Cited Authorities v

Opinions Below 1

Statement of Jurisdiction 2

Constitutional And Statutory Provisions 2

Statement of the Case 3

A. Jurisdiction of the Courts Below 3

B. Facts 4

Reasons for Denying the Petition 4

A. Neither in the Questions Presented in the Petition Nor in the Court Below did the Petitioners' Contest the District Court's Dismissal of the Complaint Under the Doctrine of Abstention, Which Failure Acts as a Waiver 4

Contents

Page

B. Petitioners' Complaint Fails to Allege and the Facts and Arguments Before the Lower Court do not Support Petitioners' New Claim of Maritime Fraud Against Respondents 6

C. The Court Below Fully Considered and Correctly Decided that No Private Right of Action Exists Under the River and Harbor Improvements Act, 33 U.S.C. § 540 8

D. The Lower Court's Decision That the Dormant Commerce Clause Does Not Give Rise to Federal Subject Matter Jurisdiction Over Petitioners' Claims Follows Supreme Court Precedent 10

Conclusion 11

TABLE OF CITED AUTHORITIES

Page

Cases:

Adickes v. Kress & Co., 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970) 5

Boatowners and Tenants Assoc., Inc. v. Port of Seattle, 716 F.2d 669 (9th Cir. 1983) 8, 9

California v. Sierra Club, 451 U.S. 287, 101 S. Ct. 1775, 68 L. Ed. 2d 101 (1981) 9

C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994) 10

Delta Airlines v. August, 450 U.S. 346, 101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981) 5

Executive Jet Aviation, Inc. v. City of Cleveland, Ohio, 409 U.S. 249, 93 S. Ct. 493, 34 L. Ed. 2d 454 (1972) 7

Foremost Insurance Co. v. Richardson, 457 U.S. 668, 102 S. Ct. 2654, 73 L. Ed. 2d 300 (1982) 7

Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 115 S. Ct. 1043, 130 L. Ed. 2d 1024 (1995) 7

Cited Authorities

Page

Gwynedd Properties, Inc. v. Lower Gwynedd Township, 970 F.2d 1195 (3d Cir. 1992) 6

Harvey & Harvey, Inc. v. City of Chester, 68 F.3d 788 (3d Cir. 1995) 10

Lewis v. B.T. Investment Managers, Inc., 447 U.S. 27, 100 S. Ct. 2009, 64 L. Ed. 2d 702 (1980) ... 10

Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987) 7

Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) 5

Nixon v. Fitzgerald, 457 U.S. 731, 102 S. Ct. 2690, 73 L. Ed. 2d 349 (1982) 5

Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206, 118 S. Ct. 1952, 141 L. Ed. 2d 215 (1998) 5

Sisson v. Ruby, 497 U.S. 358, 110 S. Ct. 2892, 111 L. Ed. 2d 292 (1990) 7

United States v. United Foods, Inc., 533 U.S. 405, 121 S. Ct. 2334, 150 L. Ed. 2d 438 (2001) 5

Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971) 6

Cited Authorities

Page

Constitutional and Statutory Provisions:

U.S. Constitution. Art. I, § 8, Cl.3 ..... 2, 3

28 U.S.C. § 1291 ..... 2, 3

28 U.S.C. § 1331 ..... 2, 3, 6

33 U.S.C. § 540 .....i, 3, 8

Rule:

Sup. Ct. R. 10 11

Respondents BP Products North America, Inc., Essex Chemical Corporation, and Dow Chemical Company (collectively "Respondents") respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Third Circuit's opinion in this case. The opinion of the Third Circuit may be found at 2006 U.S. App. LEXIS 1722.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1a-10a) is unreported and is not precedential.

The Opinion of the United States District Court for the Eastern District of Pennsylvania (Pet. App. 11a-18a), which was issued on February 18, 2005, following the District Court's February 14, 2005 Order granting Respondents' motions to dismiss and denying Petitioners' motion to dismiss or in the alternative leave to amend the complaint, explains in detail the basis for its decision. The Order and Opinion of the District Court are unreported.

Petitioners fail to state in their Petition for a Writ of Certiorari all of the reasons upon which the District Court granted the Respondents' motions to dismiss and denied the Petitioners' motion to amend. In addition to dismissing the Petitioners' Complaint for lack of subject matter jurisdiction, the District Court properly granted the Respondents' motions to dismiss, in the alternative, for lack of ripeness and pursuant to the doctrine of abstention. Likewise, the District Court denied the Petitioners' motion to amend for lack of ripeness and under the doctrine of abstention because, although "plaintiff's property has been designated an 'area in need of redevelopment,' no declaration of taking has been filed by the Borough [of Paulsboro]. Until plaintiff's property is condemned, and the condemnation approved by the New Jersey courts, it is unlikely that a controversy exists." (Pet. App. 17a).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on January 24, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Art. I, § 8, Cl.3 provides in relevant part: "The Congress shall have Power . . . [t]o regulate Commerce . . . , among the several States. . . ."

28 U.S.C. § 1291.

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1331. "The district courts shall have original jurisdiction of all civil actions arising under the Constitutions, laws, or treaties of the United States."

33 U.S.C. § 540 *et seq.*

> Federal investigations and improvements of rivers, harbors, and other waterways shall be under the jurisdiction of and shall be prosecuted by the Department of the Army under the direction of the Secretary of the Army and the supervision of the Chief of Engineers, except as otherwise specifically provided by Act of Congress, which said investigations and improvements shall include a due regard for wildlife conservation.

STATEMENT OF THE CASE

A. Jurisdiction of the Courts Below

The United States Court of Appeals for the Third Circuit exercised its jurisdiction over this matter pursuant to 28 U.S.C. § 1291.

Petitioners misstate the jurisdiction of the United States District Court for the Eastern District of Pennsylvania. The District Court determined it lacked federal question jurisdiction over the claims, notwithstanding the Petitioners' invocation of 28 U.S.C. § 1331, the River and Harbor Improvements Act, 33 U.S.C. § 540 *et seq.*, and the Commerce Clause of the United States Constitution, Article 1, Section 8, Clause 3, as the bases for jurisdiction. The District Court, in its Memorandum Opinion of February 18, 2005 (Pet. App. 11a-18a), ruled that: (1) the River and Harbor Improvements Act did not provide a private right of action and, therefore, could not afford Petitioners' a predicate for jurisdiction, regardless of whether the alleged violations occurred; and (2) the Commerce Clause did not offer a basis

for the exercise of federal question jurisdiction because Petitioners failed to allege any facts that would suggest that the Borough of Paulsboro's designation of Petitioners' property as an area in need of redevelopment materially affected interstate commerce. Rather, the facts, as alleged, constitute nothing more than a private individual's challenge to a municipality's exercise of its power to enact local land use laws. Further, the District Court held that amendment of the Petitioners' Complaint would be futile because the Petitioners' claims are not ripe and the doctrine of abstention would prohibit the exercise of jurisdiction by the District Court.

B. Facts

Respondents incorporate by reference herein the statement of the facts set forth in the opinion of the United States Court of Appeals for the Third Circuit.

REASONS FOR DENYING THE PETITION

A. Neither in the Questions Presented in the Petition Nor in the Court Below did the Petitioners' Contest the District Court's Dismissal of the Complaint Under the Doctrine of Abstention, Which Failure Acts as a Waiver.

In dismissing the Complaint, the District Court relied, as an independent and alternative basis for dismissal, on the lack of ripeness of the Petitioners' claims and on the doctrine of abstention. Neither ripeness nor abstention were raised in Petitioners' appeal to the Third Circuit, and the Petitioners failed to present any legal arguments on these issues in their brief to the Third Circuit. Accordingly, Petitioners' waived their right to appeal these issues and the District Court's dismissal of the Complaint on these grounds.

Despite such waiver, and despite having failed to raise it as a question presented in the Petition, Petitioners have improperly inserted into their Petition an argument contesting the District Court's reliance on the doctrine of abstention as a basis for the dismissal of the Complaint. Having waived in the Appellate Court their right to contest the dismissal of the Complaint for lack of ripeness and abstention, this Court should not grant Petitioners certiorari to now contest the District Court's application of the doctrine of abstention. *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212-13, 118 S. Ct. 1952, 141 L. Ed. 2d 215 (1998); *Delta Airlines v. August*, 450 U.S. 346, 362, 101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981)("question presented in petition but not raised in court of appeals is not properly before us"); *United States v. United Foods, Inc.*, 533 U.S. 405, 121 S. Ct. 2334, 150 L. Ed. 2d 438 (2001)(refusing to consider arguments by petitioner not pressed below). Compare *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23, 102 S. Ct. 2690, 73 L. Ed. 2d 349 (1982) and *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) (both holding that "purely legal questions" presented in a petition may be appropriate for decision even though not addressed by the lower court).

Even if the Court were to consider the Petitioners' argument against application of the doctrine of abstention as a basis for dismissal of their Complaint, the Petition must still be denied as the Petitioners' argument lacks legal merit. Petitioners' rely, erroneously, on maritime law as the basis for their argument that their federal action should take precedence over their previously filed New Jersey state court action. Missing from Petitioners' argument, however, is any indication of the maritime activity at issue. Rather, as

properly noted by both the Third Circuit and the District Court, Petitioners' claims concern, solely, a purported scheme by the Respondents to deprive the Petitioners' of their property rights through the enactment of a local land use ordinance. In this context, and relying on this Court's previous decision in *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed 2d 669 (1971) and on the Third Circuit's previous decision in *Gwynedd Properties, Inc. v. Lower Gwynedd Township*, 970 F.2d 1195 (3d Cir. 1992), the District Court held, correctly, that ". . . the legality of a local land use ordinance entails special state interests" (Pet. App. 18a, n.10) for which New Jersey law provides a mechanism to condemnees "to challenge any aspect of a condemnation in state court." (Pet. App. 18a, n.10). Accordingly, federal abstention is appropriate in this case where the Petitioners' state court appeal challenging a local land use ordinance remains pending.

B. Petitioners' Complaint Fails to Allege and the Facts and Arguments Before the Lower Court do not Support Petitioners' New Claim of Maritime Fraud Against Respondents.

A plain reading of Count II of the Petitioners' Complaint and the arguments advanced by the Petitioners in the lower court clearly evidence that the Petitioners' fraud claim is premised upon Pennsylvania common law, not maritime law. Petitioners concede in their brief to the Appellate Court (p. 25) that Count II of their Complaint is an attempt to allege a "claim for fraud under Pennsylvania law." It is axiomatic that a common law claim of fraud does not "arise under" the Constitution or laws of the United States and therefore does not give rise to federal jurisdiction. 28 U.S.C. § 1331;

Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987).[1]

Even assuming, arguendo, that the Petitioners pled a claim of fraud under maritime law, the facts as alleged fail to establish a prima facie case of fraud in the maritime context so as to invoke federal subject matter jurisdiction. The propriety of admiralty jurisdiction over particular torts, such as fraud, depends on the tort's locality and its relationship to "traditional maritime activity." *Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S. Ct. 1043, 130 L. Ed. 2d 1024 (1995). A party seeking to invoke federal admiralty jurisdiction over a tort claim must establish both the tort's locality on navigable water and a connection with traditional maritime activity. *Id.*; *see also Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 253-258, 93 S. Ct. 493, 34 L. Ed. 2d 454 (1972); *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 102 S. Ct. 2654, 73 L. Ed. 2d 300 (1982); *Sisson v. Ruby*, 497 U.S. 358, 110 S. Ct. 2892, 111 L. Ed. 2d 292 (1990). The locality test requires a court to determine whether the alleged tort occurred on navigable water or whether the injury suffered on land was caused by a vessel on navigable water. *Grubart, Inc.* 513 U.S. at 527, 534, 155 S. Ct. at 1045, 1048 (1995). Further, in determining if a connection exists between the alleged tort and traditional maritime activity, a court must first determine whether the incident has "a potentially disruptive impact on maritime commerce" and second whether the activity which caused the incident has a connection with "traditional maritime activity." *Id.* (*quoting Sisson v. Ruby*,

---

1. As aptly noted by the District Court, "[t]here is no basis for diversity jurisdiction, inasmuch as all plaintiffs and some defendants are citizens of Pennsylvania" (Pet. App. 14a, n. 6).

497 U.S. at 363, 364 n.2 and 365). Respondents' alleged fraudulent conduct in attempting to thwart Petitioners' proposed redevelopment plan and thereby deprive Petitioners' of their property rights fails to satisfy either the locality test or the connection test. Rather, the conduct of Respondents as alleged by Petitioners is entirely separate from any maritime activities that may occur in the waters that boarder the Petitioners' property. Simply labeling a claim as "maritime" does not make it so.

C. The Court Below Fully Considered and Correctly Decided that No Private Right of Action Exists Under the River and Harbor Improvements Act, 33 U.S.C. § 540.

The Appellate Court correctly decided that no express or implied private right of action exists under the River and Harbor Improvements Act (the "Act") based upon the prior well reasoned decisions of the Ninth Circuit and this Court.

First, relying on the Ninth Circuit's decision in *Boatowners and Tenants Assoc., Inc. v. Port of Seattle*, 716 F.2d 669 (9th Cir. 1983), the Appellate Court correctly determined that the Act does not provide an express private right of action to persons purportedly injured by violations of its provisions, but rather grants to the Army Corps of Engineers the authority "to conduct investigations and improvement of rivers, harbors and waterways, to grant easements on lands acquired by the United States for river and harbor improvements, to approve the plans of private persons or municipal corporations who desire to improve navigable rivers. . . ." (Pet. App. 7a).

Second, relying again on the decision in *Boatowners and Tenants Assoc., Inc., supra* and citing to this Court's previous decision in *California v. Sierra Club*, 451 U.S. 287, 101 S. Ct. 1775, 68 L. Ed. 2d 101 (1981), the Appellate Court determined that Petitioners

> failed to establish that the Act impliedly creates a private cause of action by demonstrating that they are 'one of the class for whose especial benefit the statute was enacted,' that Congress intended to create a private right of action for individuals in their class, or that their cause of action is not one traditionally relegated to state law (and thus inferring a cause of action based solely on federal law).

(Pet. App. 8a). Notably, no conflict exists in either the Third Circuit or among the Circuits on this issue.

Petitioners fail to provide the Court with a justifiable basis upon which certiorari may be granted to consider the Appellate Court's well reasoned decision on this issue. Instead, Petitioners' misstate in their Petition the basis upon which the Appellate Court reached its decision. Contrary to the Petitioners' argument, neither the Ninth Circuit's opinion in *Boatowners and Tenants Assoc., Inc., supra* nor the Appellate Court's analysis and ultimate determination in this case are fact sensitive. Rather, both decisions turn on an interpretation of the legislature's intent gleaned from a review of the language in the Act – a purely legal analysis.

D. The Lower Court's Decision That the Dormant Commerce Clause Does Not Give Rise to Federal Subject Matter Jurisdiction Over Petitioners' Claims Follows Supreme Court Precedent.

Far from ignoring or misapplying the precedent of this Court, as alleged in the Petition, the Appellate Court actually relied upon and cited to the very Supreme Court precedent which the Petitioners claim was ignored. Notably, the quotations to which the Petitioners reference in the matters of *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27, 100 S. Ct. 2009, 64 L. Ed. 2d 702 (1980) and *Harvey & Harvey, Inc. v. City of Chester*, 68 F.3d 788 (3d Cir. 1995) were cited by the Appellate Court in its analysis of the Petitioners' Commerce Clause claim.

Specifically, in considering this Court's recognition of the limits on the power of the States to erect barriers against interstate trade, as discussed in *Lewis, supra*, the Appellate Court properly framed the issue as "whether the Borough's ordinance approving the designation of Plaintiffs' property as an 'area in need of redevelopment' violates the dormant Commerce Clause." (Pet. App. 9a). The Appellate Court correctly analyzed this issue within the framework established by this Court in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994) and its own prior decision in *Harvey & Harvey, Inc., supra* In this regard, the Appellate Court recognized that "while the purpose of the dormant Commerce Clause is to prevent state and local governments [from using] their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities," *C & A Carbone, Inc.*, 511 U.S. at 394, its purpose "is not to protect individual firms. *Harvey & Harvey, Inc.*, 68 F.3d at 798.

Within this framework, the Appellate Court correctly determined that the Petitioners' failed to allege any facts suggesting that the Borough of Paulsboro's designation of their property as an "area in need of redevelopment" unduly burdens or materially affects interstate commerce such that the District Court could properly exercise subject matter jurisdiction over the Petitioners' claims. The Petitioners again fail to allege in their Petition any facts to suggest that the Borough's decision burdens or affects interstate commerce. At best, the Petition merely quibbles with the lower court's interpretation of the Petitioners' factual allegations, which is not a proper basis upon which to grant certiorari. *See* Sup. Ct. R. 10.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

PAMELA BERMAN
ADLER, POLLOCK & SHEEHAN
175 Federal Street
12th Floor
Boston, MA 02110-2890
(617) 482-0600

EDWARD J. WILBRAHAM
WILBRAHAM, LAWLER & BUBA
1818 Market Street
Suite 3100
Philadelphia, PA 19103
(215) 564-4141

Counsel for Respondents Essex Chemical Corporation and Dow Chemical Company

ALEXANDER KERR
Counsel of Record
MCCARTER & ENGLISH, LLP
Mellon Bank Center
Suite 700
1735 Market Street
Philadelphia, PA 19103-7501
(215) 979-3800

Counsel for Respondent BP Products of North America, Inc.